

STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
v.) **Case No. 05-cv-329-GKF(PJC)**
)
TYSON FOODS, INC., et al.,)
)
 Defendants.)

**STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF
ITS MOTION *IN LIMINE* TO PRECLUDE ARGUMENT,
QUESTIONING OR EVIDENCE THAT ENTRY OF THE REQUESTED
INJUNCTION UNDER RCRA WOULD INTERFERE OR CONFLICT
WITH ONE OR MORE STATE REGULATORY PROGRAMS [DKT #2416]**

COMES NOW Plaintiff, the State of Oklahoma ("the State"), and respectfully submits this reply in further support of its Motion *in Limine* to Preclude Argument, Questioning or Evidence that Entry of the Requested Injunction Under RCRA Would Interfere or Conflict with One or More State Regulatory Programs." DKT #2416.

The State has requested an order precluding Defendants from asserting that an injunction, issued pursuant to this Court's authority under 42 U.S.C. § 6972, that restricts the use of poultry waste in the IRW would interfere or conflict with any state regulatory program. Rather than attempting to deal with the merits of the State's request, Defendants spend 5½ pages of their 7-page Response addressing matters that are not the subject of the State's Motion.

Significantly, when they do finally address the subject of the State's Motion, Defendants implicitly concede the correctness of the State's position, as nowhere in their response do Defendants either address any of the long line of controlling authority holding that an imminent and substantial endangerment claim under 42 U.S.C. § 6972(a)(1)(B) is not superseded by a state

program¹ or cite to any contrary authority. Instead, Defendants argue that in framing an injunction under 42 U.S.C. § 6972, the Court should take into account existing poultry litter regulations and the impact the injunction would have on existing state programs. However, Defendants do not cite a single RCRA case in support of this novel proposition. In fact, Defendants' position runs directly contrary to the principle that conflicting or more permissive state regulatory programs yield to RCRA endangerment claims. *See* footnote 1.

Just as importantly, Defendants' position runs contrary to the teaching of the Tenth Circuit. In *Burlington Northern and Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007), the Tenth Circuit explained that 42 U.S.C. § 6972(a)(1)(B) "is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." (Citations and quotations omitted) (emphasis retained). That is to say, conflicting or more permissive state regulatory programs pertaining to poultry waste are of no relevance when it comes time for this Court to design an injunction to eliminate "any risk" from land-applied poultry waste. *See id.* at 1021 ("[G]iven RCRA's language and purpose, if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment") (citations and quotations omitted).

Defendants' reliance on *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), for the proposition that any injunction must be designed so as not to conflict with state regulation is unavailing. First, *Armstrong* is not a RCRA case; it is an ADA case. Second, *Armstrong*

¹ *See, e.g., Eckardt v. Gold Cross Servs., Inc.*, 2006 WL 2545918, at *2 (D. Utah Aug. 31, 2006); *see also Drague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992); *T&B Limited, Inc. v. City of Chicago*, 369 F. Supp. 2d 989, 993 (N.D. Ill. 2005); *Clorox v. Chromium Corp.*, 158 F.R.D. 120, 124 (N.D. Ill. 1994); *Stewart-Sterling One, LLC v. Tricon Global Restaurants, Inc.*, 2002 WL 1837844, at *2 (E.D. La. Aug. 9, 2002).

involved an application of a provision of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a), mandating that prospective injunctive relief against a state prison system be "narrowly drawn, extend[ing] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." *See Armstrong*, 275 F.3d at 872. Unlike the Prison Litigation Reform Act, RCRA contains no such limiting language, and in fact mandates that any injunction be broadly drawn to eliminate any risks. *See Burlington Northern*, 505 F.3d at 1020 (language of 42 U.S.C. § 6972(a)(1)(B) "is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes") (emphasis retained).

In sum, the authority is clear: argument, questioning or evidence that an injunction issued under RCRA would interfere or conflict with one or more state regulatory programs is irrelevant and should be excluded.

In the balance of their Response, Defendants raise two other issues, which, while not relevant to resolution of the State's Motion, nevertheless warrant a brief response. First, Defendants assert that the manner in which Oklahoma and Arkansas have regulated poultry waste is relevant to determining whether poultry waste is a solid waste within the meaning of RCRA. And second, Defendants assert that the manner in which Oklahoma has regulated poultry waste is relevant to the State's motivations for bringing this lawsuit.

Defendants' first assertion is flawed on at least two levels. Not only does it, as demonstrated above, flatly ignore that an endangerment claim stands separate from the manner in which a state regulates solid waste, but also it attempts to suggest that individual intent is a relevant consideration in determining whether a material is a solid waste. Whether a material is a solid waste is not a subjective determination, but rather an objective one. Poultry waste is a

discarded material.² It has been overapplied in the IRW. *See, e.g.*, DKT #2081-7 (Ryan P.I. Opening., p. 46) ("And I don't think there's any question but that there has been an overapplication of litter on some or many farms. That's not an issue in our book."); *see also* DKT #2062 (Facts, ¶¶ 37, 38, 39 & 41). And it is running off and leaching into the water. *See, e.g.*, DKT #2081-5 (12/5/04 advertisement by several Defendants stating: "Lately, a good deal of concern has been raised about the effect of excess nutrients on the land and waters of Eastern Oklahoma. So where do these nutrients come from? Nutrients can come from many sources, one of which is the use of poultry litter as an organic fertilizer. . . ."); *see also* DKT #2062 (Facts, ¶¶ 47, 48 & 50).

As to the second of Defendants' assertions, Oklahoma law and regulation in no way undercut the State's motivations in bringing this lawsuit. The fact of the matter is that Oklahoma statutory (and common law's treatment) of poultry waste is entirely consistent with the State's theory of RCRA liability. *See, e.g.*, 27A Okla. Stat. § 10-9.7(B)(4)(a) & (b) ("Poultry waste handling, treatment, management and removal shall . . . not create an environmental or a public health hazard, [or] not result in the contamination of waters of the state . . ."); 27A Okla. Stat. § 10-9.7(C)(6)(c) ("Discharge or runoff of waste from the application site is prohibited"); 27A

² At a soil test phosphorus level of 65 lbs. / acre or higher, there is virtually no agronomic benefit gained from applying additional phosphorus. *See, e.g.*, DKT #2088-7 (Zhang 1/16/08 Depo., p. 189); DKT #2088-8 (Mullikin 7/18/02 Depo., pp. 119-20) (testifying that STPs between 50 and 70 are sufficient for crops being grown in northwest Oklahoma and northeast Oklahoma); DKT #2088-9 (Johnson Rpt., ¶ 5). Land application of poultry waste on fields testing above 120 lbs. / acre constitutes disposal of poultry waste without benefit to crop production and with an increased risk to water quality by runoff and erosion. *See, e.g.*, DKT #2088-10 (OSU Oklahoma Cooperative Extension Service, *Science-Based Animal Waste Phosphorus Management for Oklahoma*, PT 98-1, p. 5); DKT #2088-11 (Chaubey 3/2/09 Depo., pp. 231-35) (testifying that application of poultry waste above agronomic rate for phosphorus is disposal, even if there is an agronomic need for other nutrients); DKT #2088-8 (Mullikin 7/18/02 Depo., pp. 49-50) (testifying that from an agronomic and environmental standpoint, there is no reason to apply more phosphorus on a field than the plants can uptake).

Okla. Stat. § 2-6-105(A) ("It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance"); 2 Okla. Stat. § 2-18.1(A) ("It shall be unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any air, land or waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act"). Moreover, the State's theory of RCRA liability is entirely consistent with the policies that are set out in Oklahoma law. *See, e.g.*, 27A Okla. Stat. § 2-6-102 ("Whereas the pollution of the waters of this State constitutes a menace to public health and welfare . . . it is hereby declared to be the public policy of this state . . . to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to affect such waters without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters [and] to provide for the prevention, abatement and control of new or existing water pollution . . . "); 82 Okla. Stat. § 1084.1 ("Whereas the pollution of the waters of this state constitutes a menace to public health and welfare . . . it is hereby declared to be the public policy of this state to conserve and utilize the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses . . .").

Conclusion

The State's Motion *in Limine* to Preclude Argument, Questioning or Evidence that Entry of the Requested Injunction under RCRA Would Interfere or Conflict with One or More State Regulatory Programs, DKT #2416, should be granted.

Respectfully Submitted,

W.A. Drew Edmondson OBA #2628
ATTORNEY GENERAL
Kelly H. Foster OBA #17067
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

/s/ Ingrid L. Moll

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
Mathew P. Jasinski
(admitted *pro hac vice*)

MOTLEY RICE LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1678

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
(admitted *pro hac vice*)
MOTLEY RICE LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.ok.gov
Kelly H. Foster, Assistant Attorney General	kelly_foster@oag.ok.gov
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Mathew P. Jasinski	mjasinski@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE LLC	
<u>Counsel for State of Oklahoma</u>	
William D. Perrine	wperrine@pmrlaw.net
Robert P. Redemann	rredemann@pmrlaw.net
Gregory A. Mueggenborg	gmueggenborg@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmlawok.com
Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
<u>Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.</u>	

John H. Tucker	jtucker@rhodesokla.com
Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Kerry R. Lewis	klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	
Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
Colin C. Deihl	cdeihl@faegre.com
Randall E. Kahnke	rkahnke@faegre.com
FAEGRE & BENSON, LLP	
<u>Counsel for Cargill, Inc. & Cargill Turkey Production, LLC</u>	
James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick	bchadick@bassettlawfirm.com
Vincent O. Chadick	vchadick@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmmpc.com
Randall E. Rose	rer@owenslawfirmmpc.com
OWENS LAW FIRM, P.C.	
<u>Counsel for George's Inc. & George's Farms, Inc.</u>	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mws gw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	

<u>Counsel for Peterson Farms, Inc.</u>	
John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
<u>Counsel for Simmons Foods, Inc.</u>	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
Erik J. Ives	eives@sidley.com
Frank Volpe	fvolpe@sidley.com
Cara R. Viglucci Lopez	cvigluccilopez@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
Timothy T. Jones	tim.jones@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
<u>Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.</u>	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	

LATHROP & GAGE LC	
<u>Counsel for Willow Brook Foods, Inc.</u>	
Robin S Conrad	rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER	
Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<u>Counsel for US Chamber of Commerce and American Tort Reform Association</u>	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u>	
Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
<u>Counsel for Oklahoma Farm Bureau, Inc.</u>	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov
<u>Counsel for State of Arkansas and Arkansas National Resources Commission</u>	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
<u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u>	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
<u>Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation</u>	

John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net
David E. Choate	dchoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP	
<u>Counsel for Arkansas Farm Bureau Federation</u>	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jraine@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com
William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
<u>Counsel for American Farm Bureau and National Cattlemen's Beef Association</u>	
Duane L. Berlin	dberlin@levberlin.com
LEV & BERLIN PC	
<u>Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research</u>	
A. Diane Hammons, Attorney General, Cherokee Nation	diane-hammons@cherokee.org
Sara Elizabeth Hill	sara-hill@cherokee.org
<u>Counsel for the Cherokee Nation</u>	

Also on this 4th day of September, 2009 I mailed a copy of the above and foregoing pleading to:

Thomas C Green -- via email: tcgreen@sidley.com
Sidley, Austin, Brown & Wood LLP

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Steven B. Randall
58185 County Rd 658
Kansas, Ok 74347

Cary Silverman -- via email: csilverman@shb.com
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)

/s/ Ingrid L. Moll
Ingrid L. Moll